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SEP 26 2016

LAFCO
San Bernardino County

Memorandum

To: PUBLIC AGENCY CLIENTS
From: BEST BEST & KRIEGER LLP
Date: SEPTEMBER 22, 2016
Re: ANALYSIS AND GUIDANCE ON THE CALIFORNIA VOTING RIGHTS ACT

Information presented to the Commission during
the OCT. 19, 2016 LAFCO hearing.

I. Background

The California Voting Rights Act (Elections Code sections 14025 *et seq.*) (“CVRA”) became law on January 1, 2003. The CVRA is intended to prevent the disenfranchisement of protected classes. A “protected class” is defined as including members of a race, color, or language minority group. For reasons discussed further below, most often, public agencies threatened with a CVRA challenge change their election system from an “at large” system (where the entire population votes for the legislative body) to a “by-district” or “by-division” system (one where members of the legislative body are elected from specific geographic areas only by voters who live in those areas).

Importantly for compliance and implementation purposes, the CVRA does not require a plaintiff to show the public agency has a discriminatory intent, or that minority voters live in a geographically compact area of the jurisdiction. Rather, the standard, is whether “racially polarized voting” has occurred. “Racially polarized voting” occurs when there is a difference between the choice of candidates preferred by voters in a protected class and the choice of candidates preferred by voters in the rest of the electorate.

Since its enactment and seemingly more frequently recently, many public agencies in California have been threatened with litigation under the CVRA, or have been sued for alleged CVRA violations. These agencies include cities, school districts, and even smaller water and other special districts.

The CVRA creates a “private right of action,” enforceable by any voter who is a member of a “protected class” and who resides in the jurisdiction (referred to in the law as “standing”). Where public agencies’ jurisdictions overlap (as is often the case with cities and school districts, for example), CVRA plaintiffs’ attorneys may end up targeting each jurisdiction in succession. For this reason, it is prudent for public agency governing bodies and staff to quickly note and address any public concerns related to claimed violations of the CVRA within its immediate or surrounding jurisdiction. Accordingly, if a public agency is being targeted for potential CVRA violations, then neighboring public agencies will want to take notice and determine if action might be warranted.

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Because the CVRA allows a prevailing plaintiff to recover reasonable attorneys' fees and expert witness fees (Elections Code section 14030), a number of attorneys have specialized in locating a representative plaintiff and then threatening or bringing CVRA litigation on behalf of that qualified voter. To date, most targeted agencies have settled CVRA lawsuits rather than risk having to pay significant legal costs. As part of most settlements, the public agency agrees to transition from at large elections to by-district or by-division elections. With such a change in election systems, a public agency's geographic territory is divided into voting districts that comply with state and federal law, and one candidate is elected to a governing body (i.e. city council or governing board) from a particular district and only by the voters in that established district.

If a public agency decides to transition from "at-large" elections to "district-based" elections, it is important to understand the legal steps required, as there are slight variations depending on what type of public entity is making the change in the election process— i.e. city, school district, or special district. We provide a summary of these steps below. (Note: Depending on what type of public agency the reader is from, focus should be directed to the rules affecting that type of agency upon reaching Section IV below.)

II. Purpose of this Memo

This memo is designed to inform and prepare your agency for potential or threatened CVRA litigation, as well as to provide guidance in undertaking voluntary compliance with the CVRA. By taking a proactive approach, a public agency might prevent a lawsuit, ensure control over any transition to a new election system, and avoid paying attorneys' and expert witness fees to a CVRA plaintiff. Also, due to the sensitive issues surrounding "protected classes" that can arise when dealing with the CVRA, either proactively or defensively, it is important to establish a public outreach strategy that helps constituents understand a potential transition from an "at large" to a "district-based" election process, and to allow for public input in the preparation of new district voting area maps.

III. The Law and Applicable Cases

A. The California Voting Rights Act

Under California Elections Code section 14027, an "at-large method of election" may not be imposed or applied in a manner that impairs the ability of a "protected class" to elect candidate(s) of its choice or its ability to influence the outcome of an election as a result of proven vote dilution.

Section 14028 of the CVRA then provides that a violation of section 14027 is established if it is shown that "racially polarized voting" has occurred in either elections for members of the governing body or in elections incorporating other electoral choices by the voters, such as ballot measures. As previously noted, "racially polarized voting" means voting in which there is a



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difference in the choice of candidates or other electoral choices that are preferred by voters in a “protected class,” and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.¹ As a more simplistic example, if a candidate preferred by voters in a protected class, comprised of thirty percent (30%) of the electorate, fails to be elected because their vote for such a candidate in an “at large” election is diluted by the majority, then “racially polarized voting” may have occurred.

As might be expected, the CVRA was patterned after the federal Voting Rights Act. An important distinction from the federal Voting Rights Act, however, is that the CVRA does not require the plaintiff to show the ability to create a majority-minority voting area². (Elections Code section 14028(c).) Additionally, proof of intent to discriminate against a protected class is not required. (Elections Code section 14028(d).) Due to the broad language of the CVRA, it is easier to prevail in a lawsuit under the CVRA than the federal Voting Rights Act.

To date, we are unaware of any public agency that has successfully defended itself against a CVRA lawsuit. As many public agencies have decided against fully litigating CVRA lawsuits for a number of reasons, including the broad language of the CVRA and the risk of having to pay significant attorneys’ and expert witness costs to a prevailing plaintiff, there is little case law interpreting the CVRA. That being said, two well-known and relevant CVRA cases are worth mention.

B. CVRA Cases

1. *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660

In defense to a lawsuit alleging the city violated the CVRA, the city challenged the CVRA itself as unconstitutional. While the trial court agreed, the court of appeal disagreed. The court of appeal found that since the law is race neutral, it was subject to only rational basis review, which is the lowest level of judicial review. Typically, public agencies on the defense side receive deferential treatment under rational basis review. Under this lower threshold, the court of appeal concluded that the CVRA “readily passes” such review. The conclusion that the CVRA is race neutral was based on the court’s finding that the CVRA provides voters of any race the right to bring a lawsuit claiming racially polarized voting. The court sent the case back to the trial court to consider whether there was a violation of the CVRA by the city. Rather than continue the litigation, the city settled the case, which involved submitting the matter to voters to decide whether to change to a district based voting system. It has been reported that under the

¹ Elections Code section 14026(e).

² *Thornburg v. Gingles* (1986) 478 U.S. 30, 51, n. 17.



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settlement, the city paid \$3 million in attorneys' fees to the plaintiff, in addition to spending approximately \$1.7 million on its own attorneys³.

2. *Jauregui v. City of Palmdale* (2014) 226 Cal.App. 4th 781

The court found that despite the City of Palmdale being a charter city, the CVRA applies to charter cities. Such a finding was made following the completion of the recognized four-step analysis⁴ under which the court concluded that the CVRA and its goal of preventing voter dilution is a matter of statewide concern. Further, the court found that CVRA remedies do not unnecessarily interfere with municipal governance. (Note: This finding was codified into law in 2015 by AB 277, which added "charter city" to Elections Code section 14026(c).)

IV. Preparing for and Dealing with a Potential CVRA Claim

While the facts and circumstances of each public agency will undoubtedly differ, the following is intended to provide a general summary of steps that can be considered in dealing with legal issues associated with the CVRA.

A. Demographics Analysis

A demographics analysis allows decision-makers to get a "snapshot" of its citizens and their voting patterns based on established data, including national census data. (Note: The last census was completed in 2010, and the next census will occur in 2020.) There are a number of qualified demographics firms that are experienced in completing such an analysis in consideration of the CVRA. Due to potential liability associated with the CVRA, a public agency should consult with legal counsel before deciding to undertake such an analysis and maintain the relationship with counsel throughout the process in order to maintain attorney-client confidentiality in anticipation of litigation.

In addition to providing a tool for assessing potential liability under the CVRA, a demographics analysis can also help decision-makers better understand the make-up of their constituency, which can benefit a public agency in a variety of ways beyond assessing the potential risk of a CVRA lawsuit. If a public agency is sued under the CVRA, completing a demographics analysis will become a key element of any defense should a public agency choose to defend against a CVRA lawsuit.

³ *Rey v. Madera Unified School District* (2012) 203 Cal.App.4th 1223. In this case, the court confirmed that while attorneys' fees and costs may be awarded to a prevailing plaintiff, they have to be "reasonable."

⁴ *See State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal. 4th 547, 558-59.



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B. Voluntary or Agreed to Transition to a “District-Based” Election Process

If a public agency determines it is in its best interests to transition from an “at-large” election process to a “district-based” system, then certain procedural requirements will apply depending on the type of entity. The processes for municipalities, school districts, community college districts, and special districts are set forth below with each being slightly different.

1. *Municipalities*

Optional Initial Step: Complete Demographics Analysis: As noted above, the city may complete a demographics analysis. Such a study is not required to initiate a transition to a “district-based” election process, but will likely be necessary in the event a city chooses to defend itself in a CVRA lawsuit. Further, if a public agency decides to transition to a new election system, then such an analysis will be a necessary part of the process of drawing voting districts.

Step 1: Adopt Ordinance: A city can initiate a transition to a “district-based” election process by adopting an ordinance that sets forth the following information: (1) the number of voting districts; (2) the boundaries of each voting district; and (3) appointing a term for each voting district. (Government Code sections 34871 and 34872). An ordinance initiating a transition to a “district-based” election process may also qualify via an initiative. (Government Code section 34871.) The City Council may also wish to consider whether it wants to have a mayor elected at large and the remaining seats through a by-district election process.

Step 2: Draw Voting Districts: If a lawsuit has not been filed, then as part of Step 1, a city will work with a demographer to prepare voting districts that comply with state and federal requirements (discussed in further detail below). In the event a city has been sued, then this process will be influenced by any settlement agreement or court decision.

Step 3: Public Outreach and Voter Approval: As part of Step 2, a city should engage in public outreach as part of the preparation and approval of voting district maps (also discussed in further detail below). Once the voting districts are approved by the city council, they are then placed on the ballot for approval by the municipality’s electorate⁵. **However, if a city has a population of less than 100,000**, then the ordinance to transition to a “district-based” election process can be approved without having to place it on the ballot, as long as the ordinance expressly declares that the change is being made in furtherance of the purposes of the California Voting Rights Act. (Government Code section 34886.) (Note: Legislation (AB 278) is pending gubernatorial approval to allow all cities without regard to population to act without voter approval.) Even if a ballot measure is not required by law, a city may, if it chooses, still decide to

⁵ There are legal implications for enacting an ordinance without voter approval under the CVRA. This should be discussed with legal counsel as part of considering a transition to a new election process, in addition to potential liability should a ballot measure not be approved.



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put a measure on the ballot; however, we recommend discussing the benefits and risks of such a decision with legal counsel.

Step 4: File New Maps with Registrar of Voters: Upon final approval of the new voting district maps, the map must be filed with the Registrar of Voters. As part of this step, it is important to contact the Registrar of Voters early during the process to make sure all necessary deadlines for upcoming elections are understood, as adequate lead time is needed to prepare voter materials and ballots to accommodate a change in election systems, in addition to any modifications to candidate filing documents. We also recommend working with the Registrar of Voters early in the process to determine if the proposed district boundaries match up with existing election precincts and to discuss implementation of the new election system.

Step 5: Elections: Hold elections under the new voting process and make sure all applicable governing documents are updated, in addition to understanding any potential changes in procedure that may result from vacancies or resignations from office. It is also important to note that the boundaries for voting areas should be evaluated following each 10-year census to determine if modifications are needed.

2. *School Districts*

Optional Initial Step: Complete Demographics Analysis: A school district may complete a demographics analysis. Such a study is not required to initiate a transition to a new election process, but will likely be necessary in the event a school district chooses to defend itself in a CVRA lawsuit. Further, if a school district decides to transition to a new election system, then such an analysis will be completed as part of the process of drawing voting districts.

Step 1: Pass Resolution: A school district can initiate a transition to a “district-based” election process by adopting a resolution by majority vote of the governing board.

Step 2: Draw Voting Districts: If a lawsuit has not been filed, then as part of Step 1, a school district will work with a demographer to prepare voting districts that comply with state and federal requirements (discussed in further detail below). In the event a school district has been sued, then this process will be influenced by any settlement agreement or court decision. As part of this step, a school district should engage in public outreach as part of the preparation and approval of voting district maps (also discussed in further detail below).

Step 3: Approval by County Committee: Generally, upon approval by the governing board of the resolution to transition to a “district-based” election process and the proposed final voting area map, the proposal to change election systems and voting area maps must be approved by the County Committee on School District Organization during a public hearing. (Education Code section 5019.) Accordingly, it is important to communicate any plans to change election systems with staff from the County Committee.



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Step 4: Place on the Ballot or Seek SBE Waiver: Under Education Code section 5020, the proposal to transition to a new election process is to be placed on the ballot for approval by the electorate within the jurisdiction of the school district. However, it is also possible to seek a waiver of the ballot requirement through the State Board of Education (SBE) pursuant to Education Code section 33050. (Note: The SBE waiver process requires proper lead time and coordination with SBE staff.)

Step 5: File New Maps with Registrar of Voters: Upon final approval of the new voting district maps, the maps then need to be filed with the Registrar of Voters. As part of this step, it is important to contact the Registrar of Voters early during the process to make sure all necessary deadlines for upcoming elections are understood, as adequate lead time is needed to prepare voter materials and ballots to accommodate a change in election process, in addition to any modifications to candidate filing documents.

Step 6: Elections: Hold elections under the new voting process and make sure all applicable governing documents are updated, in addition to understanding any potential changes in procedure that may result from vacancies or resignations from office. It is also important to note that the boundaries for voting areas will need to be evaluated following each 10-year census to determine if modifications are needed.

(Note: For community college districts, only the following steps are required: 1) Pass a Resolution; 2) Prepare and approve voting districts; 3) Approval of the transition by the Board of Governors of the California Community Colleges; and 4) File new maps and hold elections. Pursuant to Education Code section 72036, there is no requirement to get approval of the change in election process by the electorate.)

3. *Special Districts*

Recognizing there is not a clear procedure in place for a special district to transition to a “district-based” election process, the California legislature passed Assembly Bill 2389. If signed by the Governor, special districts would be able to change to a “district-based” election process by passing a resolution and finalizing voting area maps that comply with state and federal requirements. There would be no requirement that the change in election process be submitted to the voters for approval; however, the resolution will need to expressly state that the change is being completed in furtherance of the purposes of the CVRA.

Notwithstanding there being no clear mandated process for special districts to change election systems, some special districts have still decided to move forward with a change in election systems to reduce any liability under the CVRA.

(Note: As part of the processes described above for changing election systems, it is important to be very cognizant of all open meetings and open records law requirements as a public agency considers any potential transition to a new election process in order to ensure compliance with



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the CVRA. The entity should consult with legal counsel before and during any transition to a new election process.)

C. Legal Requirements for Drawing Voting District Maps

Voting district maps must be prepared in compliance with certain state and federal requirements. Perhaps the most important is the long-recognized “one-person, one vote” standard, which requires all voting districts be as nearly equal in population as possible. While some minor deviation will be allowed depending on particular facts and circumstances, it is important to consult and work with an experienced demographer and knowledgeable legal counsel to ensure compliance with state and federal laws⁶.

Other factors that can be considered in preparing voting district boundaries are maintaining communities of interest, using identifiable geographic boundaries, ensuring districts are geographically contiguous, and ensuring geographical compactness. (See Article 21 of California Constitution.) Additionally, a public agency should avoid drawing any boundaries solely in consideration of the place of residence of any existing council or governing board member.

While the process of drawing voting districts can seem daunting, working with experienced demographers who have up to date software will make the process much easier and reduce any potential liability associated with claims of non-compliance or gerrymandering. Working with an experienced demographer is also important because all voter information should be considered when preparing maps and an experienced demographer will know how to access and analyze both raw census data and citizen voting age population data that is compiled through surveys separately and more frequently than the 10-year census.

Additionally, developing viable goals and a framework within the confines of the law early on, and with public input, can help with the process of preparing a final voting district map that reflects the interests of the community.

D. Public Outreach

Implementing the CVRA can be a sensitive and difficult process, marked with contentious and conflicting comments and concerns. Educating the public about the law and the potential legal exposure faced by a public agency for non-compliance can help foster an environment that produces productive discussions about whether and how to transition to a “district-based” election process.

Moreover, establishing a public outreach plan and holding community meetings during the process of drawing voting area maps will help ensure voting area maps are created that reflect

⁶ For now, the U.S. Supreme Court has held that total population is the appropriate district size comparison factor, rather the eligible voter population. *Evenwel v. Abbott* (2016) 578 U.S. ____; 136 S.Ct. 1120.



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the interests of the electorate. Doing so will also help in getting a plan approved if a ballot measure is required. In certain situations, holding a fixed or certain number of public hearings may be required by applicable law of the jurisdiction, or of the terms of a settlement agreement, as well.

Making a record of public outreach and transparent consideration of all public comments will also help reduce or eliminate liability in the event of a legal challenge to the final adopted voting district boundaries. Such diligence will also assist with obtaining any additional approvals from oversight bodies, particularly when a school district or community college district is seeking to change its election process.

Finally, demonstrating a willingness to work with the public and initiate a dialogue early on in the transition process can help avoid potentially divisive and contentious conversations related to race and representation that can sidetrack the overall goal of reducing potential liability under the CVRA.

VI. Conclusion

Determining whether the CVRA requires a change in a council or board member election process, and achieving compliance with state and federal law if it does, raises a host of difficult legal and sensitive community issues. Due to the potential liabilities created by the CVRA, public agencies should consider being as proactive as possible to ensure compliance with the law. If a public agency has any concerns about CVRA compliance, such proactivity can range from receiving a more detailed briefing on the CVRA, completing a demographics analysis, or transitioning to a new election system. There is no one-size-fits-all approach as each agency will have its own unique facts and circumstances impacting any decisions related to CVRA compliance.

Finally, it is important to set the tone early on that moving from an “at-large” election process to a “district-based” election process does not change the fact that all residents of the jurisdiction remain a part of one, unified city, school district, community college district or special district with common goals and interests, and responsibilities to all others, no matter which voting district a resident or elected official resides in.

Should you have any questions or concerns regarding the information contained in this memo or need guidance on the CVRA, please do not hesitate to contact one of the attorneys in our Public Policy & Ethics Group or your Best Best & Krieger attorney.

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